Supreme Court, U.S.
FILED
FEB 2 2 2002
OFFICE OF THE CLERK

No. 01-584

IN THE

Supreme Court of the United States

WANDA ADAMS, *et al.*,
Petitioners,

v.

FLORIDA POWER CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

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February 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Respondents Florida Power Corporation, *et al.*[1] The written consent of all parties has been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

broad segment of the business community and includes over 340 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding whether the "disparate impact" theory of discrimination is available under the ADEA. Because of this interest, EEAC has filed *amicus curiae* briefs in cases addressing this issue before this Court and in several circuit courts of appeals.[2] EEAC also has participated in a number of other cases before this Court involving the ADEA.[3]

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

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[2] *E.g.*, *Frank v. United Airlines, Inc.*, No. 00-948, *cert. denied*, 532 U.S. 914 (2001); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *Hiatt v. Union Pac. R.R. Co.*, 65 F.3d 838 (10th Cir. 1995); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984).

[3] *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158 (1989); *Shell Oil v. Dartt*, 434 U.S. 600 (1977) (per curiam).

STATEMENT OF THE CASE

Respondent Florida Power Corporation ("Florida Power") produces and distributes electricity throughout the State of Florida. Resp. Opp. Br. 2. In 1992, Congress enacted the Energy Policy Act of 1992, 106 Stat. 2776, which deregulated the energy industry and opened it to competition among and between utility companies. *Id.* In an effort to prepare for this change, Florida Power experienced several business reorganizations, which resulted in the elimination of over 1,200 positions. *Id.*

Petitioners, former employees of Florida Power, commenced an action in the U.S. District Court for the Middle District of Florida alleging that Florida Power terminated their employment in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* *Id.* Specifically, they alleged that as part of its company-wide reduction in force, Florida Power unlawfully targeted older workers for position elimination in favor of those employees under age 40. Resp. Opp. Br. App. 3a.

On November 30, 1995, Petitioners moved for class certification, *id.* at 4a, and on December 11, 1996, the district court conditionally certified the class. *Id.* at 6a. The class was defined to include "all former employees of Florida Power who were terminated from employment on or after July 1, 1993 as part of the redeployment or career transition programs and who were forty years of age or older at the time of their respective terminations." *Id.* The district court subsequently decertified the class, ruling that the disparate impact theory of discrimination is not available under the ADEA. Pet. App. 25a.

Petitioners appealed to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the district court's ruling. Pet. App. 1a.

SUMMARY OF ARGUMENT

The court below was correct in holding that a violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, may not be established using a "disparate impact" theory of employment discrimination. A contrary conclusion simply cannot be reconciled with this Court's ruling in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that legitimate business decisions only indirectly correlated with age do not violate the ADEA under a disparate treatment theory of discrimination.

While the Court in *Hazen Paper* did not decide the issue directly, Justice O'Connor, writing for a unanimous Court, categorically declared that "disparate treatment," as distinct from disparate impact, "captures the essence of what Congress sought to prohibit in the ADEA." *Id.* at 610.

This Court's ruling in *County of Washington v. Gunther*, 452 U.S. 161 (1981), further supports the principle that disparate impact actions are not available under the ADEA. In *Gunther*, the Court held that disparate impact claims of discrimination are unavailable under the Equal Pay Act (EPA), 29 U.S.C. § 206(d), which prohibits wage discrimination "on the basis of sex," but allows for differences in pay based on "any other factor other than sex." 29 U.S.C. § 206(d)(1).

Like the EPA, the ADEA prohibits employment discrimination "because of" an individual's age, 29 U.S.C. § 623(a), but permits differences that are based on "reasonable factors other than age." 29 U.S.C. § 623(f)(1). Given the strong similarities between the texts of the EPA and the ADEA, this Court's rationale in *Gunther* should apply to preclude disparate impact claims brought under the ADEA.

Furthermore, the plain language, purpose and legislative history of the ADEA all point to the conclusion that Congress enacted the ADEA to prevent intentional, age-based employment discrimination, not employment decisions or

practices based on factors "analytically distinct" from age, even where such factors may be "correlated with age." *Hazen Paper,* 507 U.S. at 611.

The disparate impact theory originated as a judicially-conceived doctrine designed to address aspects of discrimination on the basis of race and other immutable characteristics, covered by Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.,* that have no parallel in the context of age. Indeed, the Secretary of Labor's 1965 report to Congress on age discrimination, which provided the principal findings and recommendations upon which the ADEA was predicated, drew a fundamental distinction between "arbitrary discrimination" on the basis of age and "institutional arrangements that indirectly restrict the employment of older workers," and offered very different approaches to solving these two distinct types of problems.[4]

The report recommended that "arbitrary discrimination" on the basis of age be prohibited by federal legislation, but that "institutional arrangements that indirectly restrict the employment of older workers" be addressed through programmatic measures such as training and education to prepare workers for job changes and reduce their vulnerability to displacement. *Id.*

This distinction was reiterated throughout the legislative deliberations on the ADEA and ultimately was embraced by Congress in the Act's very declaration of purposes. Thus, the ADEA states:

> It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than

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[4] U.S. Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report to Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965), reprinted in Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Educ. and Labor, 89th Cong., 1st Sess. 201-29 (1965) (hereinafter cited as 'Secretary's Report').

> age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b). In short, unlike Title VII, the ADEA expressly addresses the issue of "impact" and adopts measures to deal with it other than through application of statutory prohibitions designed to address intentional discrimination.

Finally, a disparate impact analysis is fundamentally unsuitable for use in ADEA cases. Because age is a constantly evolving personal characteristic, to monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age, and no employer could be certain of being in compliance for more than a day at a time.

Additionally, unlike other protected characteristics, age often is correlated to legitimate criteria such as seniority, salary and the like, which routinely are used by employers as a means of differentiating among employees. Were this Court to recognize disparate impact claims under the ADEA, employers would be limited in their ability, for instance, to manage business downturns through the use of layoffs or reductions in force.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED AS A MATTER OF LAW THAT THE DISPARATE IMPACT THEORY OF DISCRIMINATION IS UNAVAILABLE UNDER THE ADEA

A. The Unanimous Supreme Court's Categorical Declaration in *Hazen Paper* That Disparate Treatment "Captures the Essence of What Congress Sought To Prohibit in the ADEA" Cannot Be Reconciled With a Rule Permitting Disparate Impact Claims Under That Statute

In its unanimous decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), this Court ruled that legitimate business decisions only indirectly correlated with age do not violate the ADEA under a disparate treatment theory of discrimination. The Court discussed the distinction between the "disparate treatment" and "disparate impact" theories of discrimination and noted pointedly, "we have never decided whether a disparate impact theory of liability is available under the ADEA." *Id.* at 610 (citing *Markham v. Geller*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of certiorari)).

The Court proceeded to describe the elements of a disparate treatment cause of action and then declared categorically, "Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper,* 507 U.S. at 610-11.[5] The Court explained:

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[5] Lest a stronger cautionary note were needed to those who would assume that the disparate impact theory applies to the ADEA as well as to Title VII, three justices filed a concurring opinion in *Hazen Paper* emphasizing that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII" and that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." 507 U.S. at 618 (concurring opinion of Justice Kennedy, joined by the Chief Justice and Justice Thomas).

> Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes . . .
>
> * * *
>
> When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.

Id. Thus, while this Court characteristically limited its holding to the specific issue before it, 507 U.S. at 611-12, the language and rationale of *Hazen Paper* indicate strongly that, if presented with such a case, this Court would declare disparate impact claims unavailable as a matter of law under the ADEA.

The court below therefore properly relied on *Hazen Paper* to reach the logical conclusion that while disparate treatment claims are available under the ADEA, disparate impact claims are not.[6] Noting the split in opinion among federal appellate courts, the court below adopted the reasoning of the First, Third, Sixth, Seventh and Tenth Circuit Courts of Appeals, which either "have questioned the viability of disparate impact claims under the ADEA post-*Hazen,*" or

[6] *Amici* for Petitioners seek to blur the distinction between disparate impact and disparate treatment discrimination, arguing that stereotypes often form the basis for neutral policies and practices. In fact, even the unconscious use of stereotypes in employment decision-making connotes hidden cognitive bias *directly related* to a protected characteristic, and is not facially neutral. As such, reliance on stereotypes is characteristic-driven and therefore unsuitable for analysis under the disparate impact theory.

have ruled unequivocally that disparate impact discrimination claims are not cognizable under the ADEA. Pet. App. 5a (citations and footnote omitted).[7]

B. This Court's Holding in *County of Washington v. Gunther* Stands for the Proposition That Disparate Impact Claims Are Impermissible Where a Decision Based on Factors Other Than Protected Class Membership Is Expressly Permitted by Statute

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court held that the Bennett Amendment to Title VII, which prohibits sex-based wage discrimination claims where the pay differential in question is authorized by the Equal Pay Act, effectively incorporates into Title VII the Equal Pay Act's four affirmative defenses, including the defense for differentials based on "any other factor other than sex."[8] The

[7] In direct conflict with the Court's reasoning in *Hazen Paper*, the Ninth Circuit continues to rely on pre-*Hazen* precedent to unconditionally allow disparate impact causes of action under the ADEA. *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), *cert. denied,* 532 U.S. 914 (2001). While also generally recognizing disparate impact age discrimination claims, unlike the Ninth, the Second and Eighth Circuits have limited the circumstances under which such causes of action brought under the ADEA may proceed. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999).

In particular, neither circuit will allow a disparate impact action under the ADEA where the complained-of policy or practice disproportionately disadvantages only a sub-group of persons within the protected class. *Id.* Thus, if a challenged company policy is alleged to have a disparate impact only on workers who are 50-plus years old and not the entire class of individuals age 40 or more, the Second and Eighth Circuits have ruled that such a claim is outside the scope of ADEA coverage. *Id.*

[8] The EPA provides, in relevant part:

> No employer having employees subject to any of the provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate

Court rejected the argument that the defense already was implicit in Title VII, and stated that the defense "could have significant consequences for Title VII litigation [involving alleged sex-based pay discrimination]." *Id.* In doing so, the Court intimated that the "factor other than sex" defense was inconsistent with the *Griggs* disparate impact doctrine, and suggested that the defense appeared to have been designed to limit the application of the Equal Pay Act to disparate treatment claims. *Id.*

Contrasting the EPA with Title VII, the Court in *Gunther* noted that Title VII was designed not only to prohibit "overt discrimination," but also to proscribe "practices that are fair in form, but discriminatory in operation." *Gunther* at 170 (citation omitted). The Court observed further:

> The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

Id. (citation and footnote omitted). The Court concluded that unlike Title VII, the EPA was structured only to forbid intentional, sex-based discrimination. Thus, an employer that makes an employment decision based on some factor "other than" sex will not violate the EPA, even if that factor has a disproportionately adverse impact on women.

> less than the rate at which he pays wages to employees of the opposite sex in such establishment . . . except where such payment is made pursuant to . . . a differential based on any other factor other than sex.

29 U.S.C. § 206(d)(1).

Like the EPA, the ADEA prohibits arbitrary employment discrimination "because of" an individual's age, 29 U.S.C. § 623(a), but permits differences that are based on "reasonable factors" other than age:

> It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where . . . the differentiation is based on reasonable factors other than age . . .

29 U.S.C. § 623(f)(1). Thus, the ADEA provides a specific statutory exception to liability for discrimination—similar to that contained in the EPA—where the complained of conduct is based on a factor "other than" age. Indeed, this Court has pointed out that this provision was included in the ADEA specifically "to insure that employers were permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983). Moreover, the Court now has made clear that a neutral criterion cannot be deemed to be *dependent on* age simply because it is "*correlated with* age." *Hazen Paper*, 507 U.S. at 611 (emphasis added).

Several courts have relied on *Gunther* as further support for disallowing disparate impact claims under the ADEA. *Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996). In *Mullin v. Raytheon*, for instance, the First Circuit reasoned:

> When the ADEA's general prohibition and the statutory exception are read in *pari materia,* as a unified whole, the prohibition forbids disparate treatment based on age and the exception authorizes disparate impact. Thus, Professor Laycock's commentary, made in the Equal Pay Act context, applies equally to the ADEA: "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

Mullin, 164 F.3d at 702 (quoting Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other*

Title VII Issues, 49 L. & Contemp. Prob. 53, 55 (1986)). *Cf. Markham v. Geller*, 451 U.S. 945, 949 (1981) (Rehnquist, J., dissenting from denial of petition for writ of certiorari) (noting that ADEA "provides that it shall not be unlawful for an employer to take any action otherwise prohibited 'where the differentiation is based on reasonable factors other than age'"). The First Circuit observed further, "[w]e hasten to add that since Title VII contains no comparable exception, this difference in the statutory schemes further distinguishes *Griggs*." 164 F.3d at 702 n.5.

In view of the clear parallel between the EPA and the ADEA regarding exceptions to liability for conduct based on factors "other than" a protected characteristic, the court below determined correctly that, as under the EPA, disparate impact claims of discrimination simply are not available under the ADEA.

C. The Plain Language and Legislative History of the ADEA Confirm Congress' Clear Intent To Preclude Disparate Impact Claims Under the Act

1. The Secretary of Labor in his report to Congress recommended that unintentional age discrimination be addressed in "alternative ways"

As this Court has recognized,[9] the passage of the ADEA was strongly influenced by the contents of a 1965 report by then Secretary of Labor Willard Wirtz [10] in accordance with a

[9] *See EEOC v. Wyoming*, 460 U.S. 226, 230 (1983).

[10] U.S. Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report to Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 201-29 (1965) (hereinafter cited as 'Secretary's Report').

directive incorporated in Title VII.[11] After conducting a study of the factors that tended to result in age discrimination in employment, Secretary Wirtz concluded:

> The gist of the matter is that "discrimination" means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example —race. It means in connection with the age question, furthermore, several different things.[12]

The Secretary's Report went on to differentiate between what it termed "arbitrary discrimination" on the basis of age —*i.e.*, discrimination based on assumptions about people's ability resulting from age-based stereotypes—and problems resulting from factors that "affect older workers more strongly as a group than they do younger workers." [13] It recommended that "arbitrary discrimination" on the basis of age be prohibited by federal legislation, but that "institutional arrangements that indirectly restrict the employment of older workers" be addressed through programmatic measures such as training and education to prepare workers for job changes and reduce their vulnerability to displacement.[14]

[11] Significantly, Congress decided to order the Secretary's Report, rather than simply include age among the categories of employment discrimination prohibited by Title VII, at least in part because members raised doubts that age discrimination presented the same types of problems as discrimination on the basis of race, color, religion, sex and national origin. *EEOC v. Wyoming*, 460 U.S. at 229.

[12] Secretary's Report at 5.

[13] *Id.* at 11. As examples of such factors, the report mentioned health differentials between younger and older workers, the lower educational attainment of older workers, changes in technology, possible lowerings of productivity, and a "range of institutional arrangements that indirectly restrict the employment of older workers." *Id.* at 15.

[14] *Id.* at 15.

Specifically, the report recommended that Congress take action to eliminate "arbitrary discrimination" by declaring and implementing "a national policy with respect to hiring on the basis of ability rather than age," backed up with provisions for "action" where necessary in "cases of alleged violations of [the] policy."[15] Significantly, however, the Secretary's Report did *not* recommend that Congress also outlaw those practices that "affect older workers more strongly as a group."[16] Rather, it recommended addressing these latter types of problems through programmatic measures to increase the availability of work for older workers and to enlarge educational opportunities for older workers.[17]

2. The ADEA was designed to prohibit "arbitrary" age discrimination

This same distinction ultimately was embodied in the ADEA's statement of findings. Section 2(a)(2) of the ADEA contains Congress' findings that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice," and that "certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). Yet, Section 2(a)(4) states only that "the existence in industries affecting commerce of *arbitrary discrimination* in employment because of age, burdens commerce and the free flow of goods in commerce." 29 U.S.C. § 621(a)(4) (emphasis added). Thus, it is only "arbitrary discrimination," and *not* "practices [that] may work to the disadvantage of older persons," that Congress found to burden interstate commerce. It therefore follows that Congress intended that the ADEA's prohibitions encompass solely arbitrary discrimination, which was equated through the Act's legislative history with intentional discrimination.

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[15] *Id.* at 22.

[16] *Id.* at 21-22.

[17] *Id.* at 23-24.

This conclusion draws further support from the ADEA's declaration of purpose. Section 2(b) of the Act, 29 U.S.C. § 621(b), states:

> It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b). Again, this declaration indicates that the ADEA was designed to prohibit only "arbitrary discrimination," while directing that "problems arising from the impact of age on employment" be addressed through other measures, just as the Secretary of Labor had recommended. Title VII, in contrast, contains no express indication that problems involving "impact" are to be dealt with differently than intentional discrimination.[18]

3. Congress chose not to amend the ADEA post-*Griggs* to permit disparate impact claims under the Act

Neither the language of the ADEA, nor the original Title VII language after which the ADEA's prohibitory provisions were patterned, contains any reference to disparate impact. Rather, the disparate impact theory of discrimination is a judicially created doctrine based on an interpretation of Congress' intent in enacting Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), this Court clarified and, some believed, significantly

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[18] The fact that Congress chose in 1967 to enact a new and entirely separate piece of legislation, rather than simply amending Title VII to add age to the list of protected characteristics, further demonstrates that Congress did not intend Title VII and the ADEA to prohibit the same forms of discrimination.

changed the burdens of proof applicable in disparate impact cases under Title VII. Congress reacted in the Civil Rights Act of 1991 by amending Title VII to spell out the parties' respective burdens of proof in cases involving an "employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

Significantly, the 1991 legislation made no mention of disparate impact on the basis of age, nor did it include any similar amendment to the ADEA to codify the disparate impact theory as a part of that law.[19] This omission is telling, particularly because the Civil Rights Act of 1991 *did* include amendments to other provisions of the ADEA.[20]

The implication of this history is that Congress consciously determined to exclude disparate impact claims under the ADEA. As the First Circuit observed, "Congress' insertion of an express provision for a disparate impact cause of action in Title VII renders the absence of such a provision in the ADEA—which was undergoing revision at the same time by the same committees and in the same bill—highly significant." *Mullin v. Raytheon Co.*, 164 F.3d 696, 704 (1st Cir. 1999) (citations omitted).

[19] Were this Court to determine that disparate impact claims are available under the ADEA, the *Wards Cove* burden of proof analysis would apply in such cases, since the 1991 Act pertains only to actions brought under Title VII.

[20] Section 115 of the Civil Rights Act of 1991 amended the ADEA to provide for the filing of civil actions by individuals within 90 days following receipt of notice from the EEOC of the dismissal of a charge or termination of the Commission's proceedings with respect thereto. 29 U.S.C. § 626(e).

II. A DISPARATE IMPACT ANALYSIS IS FUNDAMENTALLY UNSUITABLE FOR USE IN ADEA CASES

A. Monitoring the Impact of Selection Decisions by Age Is Impracticable, and Would Not Yield Meaningful Data

1. Age is an inherently mutable personal characteristic

Unlike the immutable characteristics covered by Title VII, age is a progressive condition that affects everyone, but affects individuals differently at different times. Most workers eventually attain the age of 40, joining the class of individuals protected under the ADEA, and continue to age with the passage of time. Thus, for instance, the class of all ADEA-protected individuals changes each day. On average, 11,837 people will turn 40 every day in 2002.[21] Given the inherently mutable characteristics of age, it is impossible to associate a single business decision or event with any single, age-protected group.

2. Achieving statistical parity by age is impossible

Prudent employers typically monitor the impact of their selection practices on minorities and women as an early warning device to avoid potential liability under Title VII. If this Court were to adopt a rule allowing disparate impact claims to be brought under the ADEA, prudence would dictate that employers also ought to monitor their selection decisions for age-based adverse impact. In practice, however, achieving statistical parity by age is an impossible task, since the age composition of any given group is constantly changing and never static from one day to the next.

[21] Employment Policy Foundation Tabulation of Census/BLS Current Population Survey (Dec. 2001) (microdata records public use file at www.bls.census.gov/cps/cpsmain.htm.)

Since age is a continuous, rather than dichotomous variable, it may be used to divide individuals into innumerable groupings for purposes of comparisons. As a result, the statistical comparisons on which disparate impact findings invariably depend may present serious problems in the age context, *see, e.g.,* Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* § 7.11 (Shepard's/McGraw-Hill, Inc. 1998 & Supp. 2001), and efforts to correct for such problems through the use of statistical techniques such as "age-break analysis" (*i.e.* comparisons based on selected age sub-groupings) are prone to yield unreliable and even "paradoxical" results. *Id.* at § 7.03. As the Second and Eighth Circuits have concluded, comparing age sub-groups simply does not work. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999). In *EEOC v. McDonnell Douglas*, 191 F.3d 948 (8th Cir. 1999), for instance, the Eighth Circuit reasoned:

> [I]f disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in an [sic] RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force. Adoption of such a theory, moreover, might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes. . . We have held that employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination. We certainly do not think that Congress intended to impose liability on employers who rely on such criteria just because their use had a disparate impact on a subgroup.

Id. at 951 (citations omitted).

The Eighth Circuit's rationale in *McDonnell Douglas*, while addressing specifically age sub-group claims, illustrates just one of the practical difficulties associated with applying a disparate impact theory of discrimination under the ADEA. Attempting to discern whether a business practice has produced an unintended, yet adverse, effect on older workers—whether as an entire class or within smaller subgroups—necessarily would require age-based analyses of the employer's entire workforce, since the class of protected persons is guaranteed to change on a daily basis. Congress certainly did not mean to impose such an onerous—if not entirely impossible—task on employers under the ADEA, whose aim was to prohibit only arbitrary, intentional ageism.

Thus, while any employer's workforce can be divided neatly into two groups—those within the ADEA's protected class and those who aspire to be—conducting a statistical analysis to identify adverse impact is not so simple. Under this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the comparator for the purposes of assessing potential age discrimination need not be outside the protected class, *i.e.*, under 40.

Accordingly, to monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age, every single day. Since a meaningful statistical comparison requires a sufficient sample size, this calculation would actually degenerate to a mere cohort analysis—in other words, a disparate treatment analysis.

B. Age Often Is Correlated With Legitimate Criteria Used by Employers as a Means of Differentiating Between Employees

Also unlike other protected characteristics, age regularly correlates with many factors quite legitimately used to differentiate individuals in the workplace—*e.g.*, seniority,

experience, educational attainment, salary levels, etc. Indeed, as the Seventh Circuit has noted, "virtually all elements of a standard compensation package" are correlated with age and, therefore, could not be curtailed in times of business adversity without creating prima facie violations of law if the impact theory were applicable under the ADEA. *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164-65 (7th Cir. 1992). The court concluded that such a construction of the ADEA would lead to results so patently unsatisfactory—indeed, "so remote from the objectives of civil rights law"—that it must be rejected. 967 F.2d at 1165.

Because of the progressive nature of age, these facially neutral policies necessarily will have a different impact on different individuals depending on their age at the time the business decision is made. *Ellis*, 73 F.3d at 1009; *see also* Miles F. Archer, Case Note, *Mullin v. Raytheon Company: The Threatened Vitality of the Disparate Impact Theory Under the ADEA*, 52 Me. L. Rev. 149, 171 (2000). Were this Court to recognize disparate impact claims under the ADEA, employers would be severely hampered in their ability to manage their businesses, for example, by responding to business downturns through the use of layoffs or reductions in force. This is particularly true now, when companies attempt to cope with the effects of a waning economy, exacerbated by the events of September 11th.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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February 2002